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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

PEARL SPENCER,

Plaintiff and Appellant

vs.

SANTA FE TRAIL TRANSPORTA-
TION CO., a Corporation and
LEONARD RUSHING,

Defendants and Respondents

Case No.
6654

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court, in and
for Salt Lake County, State of Utah

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Attorneys for Plaintiff and Appellant

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STATEMENT OF CASE

The physical facts were as follows:

Plaintiff was injured when an automobile driven by Rose Sorenson collided with the automobile in which the plaintiff was riding. The accident occurred on U. S. Highway 89, between Redmond and Gunnison, Utah, approximately one mile and a half south of the Gunnison Sugar Factory. The time was Sunday, November 15, 1942, at approximately 6:45 p. m.

At the place where the accident occurred the road had a hard surface and was divided by a yellow line into two lanes, approximately nine feet wide. The road was straight and wet and was partially covered with slush. This much is admitted. The plaintiff's and the defendants' evidence differed as to how the accident occurred.

The difference consisted in plaintiff's evidence which showed that the bus, while travelling north on the afore-said highway at the time and place alleged, sideswiped an automobile, driven by Rose Sorenson, which was traveling in the opposite direction, causing said automobile to careen out of control onto the side of the road on which the automobile, in which plaintiff was riding as a passenger, was traveling. As a result, the Sorenson car crashed into the car in which plaintiff was riding and plaintiff sustained the serious and permanent injuries complained of. The defendants' version of the accident differs principally in the fact that they deny that the bus struck the Sorenson car. They claim to know nothing about what happened. However, they do admit that the bus was in the exact location of the accident at the approximate time the injuries complained of occurred.

PLAINTIFF'S TESTIMONY

Plaintiff's evidence in chief consisted of the testimony of four witnesses who were riding in the Sorenson car proceeding south on highway 89, toward Redmond, Utah, and of the testimony of the plaintiff and Maxine Anderson, who was the driver of the car in which plaintiff was riding.

The four witnesses who were riding in the Sorenson car told substantially the same story. (It is undenied except on one point. The defendants deny that the Santa Fe bus struck the Sorenson car.) They were all employees at the Turkey Plant in Gunnison. On November 15, 1943, at approximately 6:30 p. m. they left the

Turkey Plant in Rose Sorenson's automobile and proceeded southward toward their homes in Redmond. It was dusk and the road was wet and partially covered with slush. Rose Sorenson was driving. Emma Jensen was sitting next to her in the front seat, and Ina Sorenson and Cleone Jensen were sitting together in the back seat. When the Sorenson car approached the vicinity where the collision later occurred, the four women in the car observed the defendants' bus proceeding toward them on the highway. When they first observed the bus it was crowding the middle of the road and as it approached nearer they observed that it was over the middle line and on their side of the road. Rose Sorenson, who was driving the car, thereupon drove the car off the paved portion of the highway about two feet onto the shoulder of the road. (R. 122) At this time, her car was still in motion. As the bus approached nearer, she observed the rear portion of it suddenly slide, so that it struck the front left portion of her car and knocked her semi-conscious. (R. 112) The other three witnesses in the car then observed that the Sorenson car careened and slid over onto the portion of road reserved for north-bound traffic. At this same time, the car in which the plaintiff was riding as a passenger was proceeding north-erly about one-half a block behind the bus. The Sorenson car, while out of control, ran into the car in which plaintiff was riding, and as a proximate result, the plaintiff sustained the injuries complained of.

After the plaintiff had been taken out of the car, and after both cars had ben emptied of all occupants, a milk truck, traveling in a northerly direction, ran into the

car in which plaintiff had been riding. It thus appears from plaintiff's testimony that there had been three separate collisions on the highway at the time and place where plaintiff sustained her injuries. This is also admitted.

It appeared that immediately after the Sorenson car had collided with the car in which plaintiff was riding, that Rose Sorenson had explained her presence on the wrong side of the road by stating that she had been struck by the Santa Fe bus.

Maxine Anderson, who was the driver of the car in which plaintiff was riding, testified in behalf of the plaintiff. Her story was substantially the same as that told by the plaintiff with reference to the events occurring immediately before and at the scene of the accident.

They testified that they had been to Richfield to visit the parents of Maxine Anderson. On their return trip to Manti they passed through Redmond. While passing through Redmond they observed on the side of the road an abandoned Santa Fe bus. As they proceeded northward toward Avery Beck's place, which was where the accident subsequently occurred, a Santa Fe bus passed them going in the same direction. This bus passed them while they were on an "S" curve, which is approximately one-half to three-fourths of a mile south of Avery Beck's. When the bus passed, they observed that it was going about 35 miles an hour, which was approximately 5 miles an hour faster than they were traveling.

At the time the bus passed the two girls, they were

listening on the radio to the "Inner Sanctum" program, which came on the air Sunday evenings at that time, at 6:30 p. m. It was, therefore, sometime between 6:30 and 7:00 o'clock when the bus passed the automobile in which the plaintiff was riding.

After the bus passed the car in which plaintiff was riding, the two girls observed it proceed northerly on U. S. Highway 89 toward Avery Beck's place. They noticed nothing unusual about the bus. They remembered seeing the rear clearance lights as the bus proceeded ahead of them. When the bus was approximately one-half a block in front of the car in which the two girls were riding, and a short distance north of Avery Beck's residence, the two girls noticed the flash of lights from another car coming in the opposite direction. These lights came onto the side of the road on which plaintiff and Maxine Anderson were traveling. (R. 249) Immediately thereafter, this car continued toward them in its travel until it crashed into Maxine Anderson's car. When this happened, the plaintiff was thrown violently against the windshield and was rendered unconscious. She was unable to tell anything further regarding the accident.

Maxine Anderson said that immediately after the accident she observed the plaintiff jammed between the dashboard and the seat. (R. 227) She was unconscious and was bleeding very profusely around the face. Miss Anderson, who is a trained nurse, explained that plaintiff had an artery cut over her ear, and was bleeding badly over her entire face. Her leg was also cut and bleeding. It appeared that her upper teeth were broken

and those in her lower jaw were loosened. They succeeded in taking plaintiff out of the car and removing her to the home of Avery Beck. (R. 229)

After plaintiff had been removed, a collision occurred when a milk truck, traveling north, struck the Anderson automobile.

Miss Anderson related that the four people who were in the Sorenson car all appeared to be dazed. She said that she was a little cross with Rose Sorenson and asked her what she was doing on her side of the road. Miss Sorenson said, "My God, the bus hit me, I couldn't help it " (R. 229)

The plaintiff then related, in detail, the nature of her injuries. She explained that she had multiple cuts on her face and leg, and then pointed them out in detail to the jury. It appeared that some of these cuts, particularly near her left ear and chin, had left permanent disfiguring scars. (R. 251) It also appeared that as a proximate result, the plaintiff sustained injuries to her chin and jaw. The plaintiff had been compelled to have two upper teeth extracted, and a removable bridge inserted. She also had to have two lower teeth extracted and a removable bridge placed therein. (R. 253) It also appeared that plaintiff had been confined to her bed for approximately a week, and that she had suffered severe headaches and pain as a result of her injuries. As a result of the two removable bridges, plaintiff spoke with a distinct lisp, particularly when making the *aspirate* sounds. The record does not reveal the age of the plaintiff, but no one will question the fact that she is a young

girl in her 20's. The record does reveal that at the time of her injuries, she was employed in Sanpete County, as a public social worker.

Dr. Hunter, a local dentist, was called to testify in behalf of the plaintiff in regards to the work done to plaintiff's mouth and teeth, and the reasonable expense of the same.

DEFENDANT'S TESTIMONY

The defendants, in their evidence, disputed only one fact. They admitted that their bus was in the vicinity of the place where plaintiff was injured, at approximately the time the injuries occurred, and they did not dispute the fact that the Sorenson car had run into the car in which the plaintiff had been riding, nor did they dispute the fact that a milk truck had collided with the car in which plaintiff was riding. They did, however, deny that their bus had struck the Rose Sorenson car.

In an attempt to establish that the bus had not struck the car driven by Rose Sorenson, the defendants called the defendant, Leonard Rushing, who was the bus driver. He testified that on November 15, at approximately 6:30 p. m., he was in the vicinity where the accident occurred. He, however, stated that he knew nothing of the accident and was unaware of any noise or bumping which would apprise him of the fact that his bus had collided with any object. He did admit, however, that the passengers on his bus, destined for Salt Lake City, left the bus at Santaquin and completed the trip in another bus. The

bus which he had ben driving was returned to Phoenix, (this bus ordinarily traveled directly to Salt Lake City. The reason for changing passengers at Santaquin and retunning to Phoenix without going to Salt Lake City was unexplained. This was especially peculiar in view of the fact that the defendant claimed that the bus had been undamaged.)

The only car that the defendant Rushing remembered passing was a truck just outside of Redmond. This truck, he observed, resembled a cattle truck and had dual wheels. (R. 250) He also explained that the bus which he was driving is about 39 feet long and carries 35 passengers. When the bus is empty it weighs approximately 11 or 12 tons. (R. 353) On cross examination, the witness Rushing admitted that his bus was 8 feet wide and that when he was driving in one lane, there was only 6 inches clearing on each side. (R. 367) The witness stated that between Redmond and Gunnison he was traveling about 35 miles an hour. When he was about one mile and a half north of Redmond he passed the truck referred to. The truck which he passed was traveling about 20 or 25 miles an hour. (R. 376) The witness also admitted that his bus was the only bus of any kind that runs between Redmond and Gunnison between 6 and 7 o'clock in the evening. (R. 377) (It is approximately 10 to 13 miles from Redmond to Avery Beck's place where the accident occurred.) (R. 371)

Defendant called as a witness, Roscoe Tolstrup, who testified that he was the town marshall at Gunnison. On the 15th day of November, he was called to

Avery Beck's place which is over a mile and 6/10 south of the sugar factory. He received the call at approximately 7:00 o'clock in the evening.

On cross examination Mr. Tolstrup stated that when he arrived at the scene of the accident, the milk truck which had subsequently struck the two cars had left. He therefore stated that he could tell nothing about what damage was done by this milk truck. (T. 387)

G. W. Sorenson was called as a witness for the defendants and testified that he is an automobile dealer at Centerfield, Utah. He stated that he towed a 1937 Chevrolet sedan from Avery Beck's place on the 15th of November. On cross examination, the witness admitted that the pictures shown by Exhibits 3 and 4 did not reflect the true condition of the car as shown on November 15, (R. 395) and he stated that his mechanic turned the left front fender of the Chevrolet automobile over to Mr. Wilkinson some time subsequent to November 15, 1942.

Defendants called H. Leon Embly, highway patrolman, as a witness. He was called to the scene of the accident at approximately 7:30 p. m. and arrived there approximately ten minutes later. (R. 398) He went into the Beck residence where he saw the injured person, and had some discussion with Cleone Jensen, which discussion his counsel did not permit him to relate. (R. 399) The witness stated that the Plymouth car was smashed in front and also along the left side. The witness also stated that he called highway patrolman headquarters in Salt Lake City and asked them to check the

Santa Fe bus which was coming into Salt Lake City that night. Salt Lake City subsequently called Mr. Embly back and told him that the bus had turned around at Santaquin and had not come to Salt Lake City as scheduled. (Why did not the bus come to Salt Lake City?)' On the night of the 16th the witness stopped the north bound bus in Gunnison and made an observation to determine if any damage had been made to the left rear part of the bus. He did not observe any. The witness thought that the bus he had examined on the night of the 16th was either No. 388 or No. 387. He was not sure. (R. 406) (The bus which the defendant Rushing said he was driving on the night of the accident was No. 392.) (R. 358) The witness also checked the southbound bus on the 17th day of November, driven by Mel Rushing. There was no evidence of damage on this bus. He also examined the north bound bus and south bound bus on the 17th day of November. There was no damage on these buses. (R. 407) He did not know the number of these buses. (Note that there is no evidence from witness Embly that he ever examined bus No. 392, which was the bus driven by Leonard Rushing on the night of the accident.) He examined a bus driven by Leonard Rushing on Highway 28 on the evening of November 18th. This was about 4 miles south of Levan. He found no damage on this bus. (R. 409) The witness admitted that north of the point where the Maxine Anderson and Sorenson car collided there were tire marks going onto the west shoulder of the road. (This corroborates the testimony of the women in the Sorenson car to the effect that they drove off the highway onto the west shoulder to avoid

being struck by the Santa Fe bus.) The witness testified that in the conversations he had with the plaintiff and Maxine Anderson subsequent to the collision on November 15, the two girls had not said anything about the Santa Fe bus passing them. (R. 413, and following.)

On cross examination the witness admitted that he had made no memorandum regarding the conversation he had allegedly had with the plaintiff and Maxine Anderson, and that he also had taken no measurements at the scene of the accident. (R. 419-21) He stated that the milk truck which had hit the two cars after the first accident, was an International ton and a half truck with a rack body and a flat bed. (R. 423) As part of the cross examination of the witness, plaintiff introduced Exhibit B which consisted of notes taken by the witness immediately subsequent to his investigation at the scene of the accident. (R. 437, and following) The exhibit indicated that Cleone Jensen stated that on the night of the accident the Sorenson car and bus had collided and that Rose Sorenson said the bus struck her car. His notes also showed that the bus was due at Gunnison at 6:27 and arrived at Gunnison at 6:45 on November 15. (R. 442)

The witness admitted on cross examination that he never put any direct questions to Pearl Spencer as to whether or not she had seen the bus on the night of the collision. (R. 447) In fact he admitted that Pearl Spencer had never stated anything to him regarding the bus. (R. 448) The witness also admitted on cross examination that when there is a three car collision, it is very difficult

to determine how specific damage has been caused. (R. 449)

* The defendant then called as witnesses Clela Cherrington, Leah Cherrington, Mrs. Harold B. Fulmer, Mrs. Vera Procter and Mrs. Alice Bolton. These witnesses all stated that they were passengers on the Santa Fe bus at the time that plaintiff sustained her injuries. They all stated that it was a stormy night and that the bus was crowded and that none of them heard or felt any impact or collision at any time during the trip from Redmond to Gunnison. After this evidence had been introduced the defendants rested.

PLAINTIFF'S REBUTTAL TESTIMONY

The plaintiff called on rebuttal Mr. Royal Whitlock. Mr. Whitlock had been subpoenaed from Gunnison for the defendants, but had not been called by the defendants as a witness. In fact, he was mysteriously excused and directed to return to his home the night before the defendants introduced evidence on rebuttal. It was necessary for the defendants to subpoena him in Gunnison in order for him to re-appear as a witness. (R. 543)

The witness testified that on the night of the collision he and another person were traveling south from Centerfield to Axtel where he was scheduled to speak in Sunday night meeting. He testified that from Centerfield to the point where the accident occurred, he saw two automobiles. The first automobile was a ton and a half truck. This was about a quarter of a mile south of Centerfield. After he had traveled another mile and a

half from where he passed the truck, he passed a large passenger bus which was proceeding in the same direction as the truck. From the time he passed the bus until he arrived at the scene of the accident he passed no other automobile. It was about one half a mile from where he passed the bus to the scene of the accident. (R. 545) He then related the facts and circumstances surrounding the collision in front of Avery Beck's place. He was there when the milk truck subsequently ran into the two parked cars. In fact, he arrived at the scene of the accident before the plaintiff had been removed from Maxine Anderson's car. (R. 546) (This witness's testimony was very important as it showed conclusively that the only vehicle on the road which could have struck the Sorenson car, as alleged by the plaintiffs, was the bus which was within a half mile of the accident when Whitlock first saw it. The testimony is also important because it showed conclusively that the only truck which was on the road near the time of the collision, was a ton and a half truck which was one mile and a half in front of the bus when the bus was one half mile in front of the place where the plaintiff had been injured. Consequently this mysterious truck could not have played a part in the accident as the defendants repeatedly inferred, but did not prove.)

SPECIFICATION OF ERROR

1. Counsel for the defendants committed reversible error in questioning Rose Sorenson on her failure to have a driver's license. (R. 122-3)

2. The court committed reversible error in permitting counsel for the defendants, over plaintiff's objection, to continue questioning Rose Sorenson on her failure to have a driver's license. (R. 122-3)

3. Counsel for the defendants, Mr. Jones, committed reversible error in his argument to the jury wherein he stated and emphasized the immaterial fact that Rose Sorenson did not have a driver's license. (R. 558)

4. The court committed reversible error in giving instruction No. 6.

5. The court committed reversible error in giving instruction No. 9.

6. The court committed reversible error in giving instruction No. 10.

7. The court committed reversible error in its failure to give instruction No. 3.

8. The court committed reversible error in its failure to give instruction No. 4.

9. The court committed reversible error in its failure to give instruction No. 5.

10. The court committed reversible error in its failure to give instruction No. 6.

11. The court committed reversible error in its failure to give instruction No. 7.

12. The court committed reversible error in its failure to give instruction No. 8.

13. The court committed reversible error in its failure to give instruction No. 9.

14. The court committed reversible error in its failure to give instruction No. 10.

15. The court committed reversible error in its failure to give instruction No. 11.

16. The court committed reversible error in its failure to instruct the jury as to the legal purport and significance of the failure of Rose Sorenson to have a driver's license at the time of the grievance complained of and set forth in plaintiff's complaint.

PROPOSITION I. THE TESTIMONY INTRODUCED BY DEFENDANTS OF ROSE SORENSON'S FAILURE TO HAVE A DRIVER'S LICENSE, AND COUNSEL FOR THE DEFENDANTS DISCUSSION OF SUCH EVIDENCE BEFORE THE JURY CONSTITUTED REVERSIBLE ERROR WHICH DENIED TO THE DEFENDANT A FAIR AND IMPARTIAL TRIAL.

In Specification of Error No. 1, 2, and 3 the appellant has directed the court's attention to the record wherein the error complained of is indicated. At pages 122 and 123 of the record the following questioning of Rose Sorenson by defense counsel appears:

Q How long have you ben driving a car?

A About two years.

Q Why didn't you have a driver's license?

MR. McCULLOUGH: Objected to as incompetent, irrelevant and immaterial, whether she has or has not.

THE COURT: The objection is overruled.

Q Why didn't you have a driver's license, Miss Sorenson?

A Well, I just hadn't went and took one out is all.

Q Ever tried to get one?

A No, sir.

Q Afraid you couldn't?

A No, sir.

Q Why didn't you have one then?

MR. McCULLOUGH: Objected to as unnecessary repetition.

THE COURT: The objection is overruled.

A I will be perfectly frank with you. Our business is turkey business and I didn't take time off to go and get it, was practically the only reason.

Q In two years time you never tried to get a license?

A No, sir.

Q Afraid this nervousness you feel in driving a car would stop you from getting one?

A No.

Q On this night you didn't have any right to be on the highway driving this car, did you?

MR. McCULLOUGH: Objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

THE COURT: The objection is sustained.

Q You didn't have a license to drive that car that night?

A No, sir.

On page 558, the record indicates some of the remarks made by counsel for the defendants to the jury:

MR. JONES: "Now let us come back to their interest. Who told the plaintiff and Miss Anderson about the bus? Well, let us go back to that. Who ran into the Anderson car? The Sorenson car. What car did the damage—the Sorenson car. Who was the one that told the occupants of the Anderson car about the bus? The Sorensens, the ones who had actually done the damage. Well, if I were driving without a driver's license in these days I wouldn't want to be investigated either. If I smashed right into somebody else on the opposite side of the street, on the wrong side of the street, I wouldn't want to bear the load, if I could get out of it.

So that night they don't tell, only Cleone said anything about the bus. Of course, that is right, because the others told you they were dazed."

In BERRY, AUTOMOBILES, 6th Edition, Volume I, Page 268, Sec. 304, the following general rule relating to this question is well stated as follows:

"The operation of an automobile without a license, when one is required by law, does not affect the rights of such person, nor of those riding with him, as travelers, nor bar their right of action or defense in personal injury actions; such persons not being rendered thereby trespassers upon the highway."

In 87 AMERICAN LAW REPORTS, page 1471, the editors have reviewed to date the cases relating to the question here under discussion, and state the following:

“The later cases are agreed that the fact that the operator of the motor vehicle had no operator’s license, as required by statute, will not bar an action for injuries received, where this omission of duty had no casual connection with said injuries.”

In ZAGIER VS. SOUTHERN EXP. CO., 171 N. C. 692; 89 S. E. 43, the court stated the above general rule as follows:

“A collateral unlawful act not contributing to the injury will not bar a recovery.”

In PAGE VS. MAYORS, 191 Cal. 263; 216 Pac. 31 it was held that in an action to recover damages for a head on collision occurring upon a public highway between an automobile operated by defendant’s agent and plaintiff’s automobile, that the fact that plaintiff did not have an operator’s license at the time of the collision did not make his presence on the highway unlawful, and did not deprive him of the right of recovery, such omission having nothing to do with the accident. The court said:

“With reference to the question of the operator’s license, it is sufficient to say that it had nothing to do with the collision. We are not disposed to hold that the presence of the plaintiff upon the highway was unlawful, and that this was thus a proximate cause of his injuries or to deprive him of the right of recovery.”

In CLARK VS. DOOLITTLE 205 App. Div. 697; 199 N. Y. S. 814 the court held that the fact that the driver of plaintiff's automobile, who at the time was driving on an errand for the plaintiff, was an unlicensed driver, and was thus engaged in the violation of a statute requiring the licensing of operators or chauffeurs of motor vehicles, would not prevent the plaintiff from recovering for damage to the car caused by the negligence of defendant. The court said:

“But a mere violation of some provision of the highway law, casual and not wilful, does not make the driver of an automobile a trespasser upon the highway, without civil rights, so that all others may abandon observance of the rules of the road and the provisions of protective statutes in their relations to him. His right to recover, and the right of another by whom he is employed are not taken away because at the time of the injury he was disobeying a statute, which in no way contributed to the injury.”

The foregoing cases and authorities correctly state the law. They do not simply represent a weight of authority; there is no law that conflicts. If then the law clearly holds that failure to have a driver's license is immaterial unless some causal connection is shown, what possible justification did counsel for the defendant have in inquiring of Rose Sorenson on cross examination about whether or not she had such a license? And what justification did counsel have in arguing the matter to the jury when the record clearly indicated that the failure to have a driver's license had nothing whatsoever to do with the

plaintiff's injuries? There could have been only one purpose, and that was to influence the jurors into believing that Rose Sorenson had no right upon the highway, and to thus lead the jury into believing that her unlawful failure to have a license was the cause of the accident.

This erroneously admitted evidence and argument was rendered more harmful to the plaintiff by the fact that the court refused to instruct the jury that failure to have a driver's license was immaterial. Plaintiff requested such an instruction in her requested instructions Nos. 9 and 11. The court refused both instructions and in fact failed to give any instruction on the question of whether or not failure to have a driver's license was immaterial or not.

Plaintiffs have specified such refusal as error in specification of error Nos. 13, 15, and 16. The jurors were thus left to speculate upon a question upon which the law permits no speculation. Counsel for the defendants took full advantage of this situation in his argument to the jury and indicated by his remarks that failure to have the driver's license was the cause of the plaintiff's injuries. We submit that such evidence and comment constitutes reversible error, particularly in view of the fact that the court refused to instruct the jury on the law applicable to such evidence.

PROPOSITION II. THE COURT ERRED IN LIMITING THE JURY TO THE QUESTION OF WHETHER OR NOT DEFENDANT'S BUS STRUCK THE AUTOMOBILE DRIVEN BY ROSE SOREN-

SON, AND ERRED IN REFUSING TO INSTRUCT THE JURY THAT IF SAID BUS CROWDED ROSE SORENSON'S CAR OFF THE ROAD AND THEREBY PROXIMATELY CONTRIBUTED TO PLAINTIFF'S INJURIES THEN SAID BUS COMPANY WOULD BE LIABLE.

The court refused to give plaintiff's requested instruction No. 7, and by the court's instructions Nos. 6, 9, and 10 positively instructed the jurors that they must find that the defendant bus struck Rose Sorenson's car, and that if they found that it did not come in contact with said vehicle driven by Rose Sorenson, then they must find for the defendant.

Thus, even though the jury may have found, as the evidence certainly justified, that the bus may have forced the Rose Sorenson car off of the road and rendered it thereby uncontrollable, such evidence under the court's instructions would not justify a finding in favor of the plaintiff.

The only theory upon which the court could sustain such a limitation would be on the theory that plaintiff's proof must be strictly limited to the pleadings, and that evidence outside of an actual striking of the Sorenson car constituted a variance.

We do not understand that such a strict interpretation is proper in a code state, where substantial justice is of more importance than a technician's rule of common law pleading.

In AMERICAN JURISPRUDENCE, Vol. 41, page 554, Sec. 380 the following is written:

“The question of variance is in the absence of statutory provisions to the contrary, determined by the court from the incoherence of the statements on their face and the inference which the court may be able to draw as to their effect upon the *state of the party's preparation*. A new principle of determination has been introduced by some codes. They prescribe that no variance between the allegation and proof shall be deemed material unless it misleads the adverse party to his prejudice in maintaining his action or defense. But they do not leave it to the court, unaided by proof, to say that the variance is or is not material. On the contrary they require that it be shown by proof aliunde and to the satisfaction of the court that the alleged variance misled the complaining party to his prejudice. The burden is upon the party complaining of the variance to show that he has been misled.”

Defendant cannot possibly show that he has been misled by a theory which permits the jurors to find that defendants' bus crowded Rose Sorenson's car off the road so that the same became unmanageable and ran into the automobile in which the plaintiff was riding. Can defendants complain if the evidence fails to show all that plaintiffs allege and shows merely an actionable part of it?

Plaintiffs allege that the defendant bus came onto the wrong side of the road and struck the Sorenson car. There was practically undeniable evidence that the defendant bus, traveling on a narrow country road, crowded the Sorenson car off of the highway onto the

wet and slippery shoulder of the road. The sharp issue arose on whether or not the Sorenson car was struck by the bus. The jury may very well have concluded that the bus crowded the Sorenson car off of the road but failed to come in actual contact with it. This is actionable negligence, and the jury under proper instructions should have been permitted to so find. The court refused to so instruct.

In UTAH CODE ANNOTATED, 1943 Vol. 6 104-14-1 it is provided as follows:

“No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended upon such terms as may be just.”

Under this liberal rule of construction the Utah courts have permitted a defendant who alleged he was an owner of certain property to prove that he had simply a leasehold interest. OLSEN VS. TRIANGLE MIN. CO., 50 Utah 521; 167 Pac. 813.

Certainly a plaintiff who has introduced competent evidence to the effect that a defendants' bus struck a third car while crowding it off the road, thus causing said third car to crash into the car in which plaintiff sustained injuries should not be precluded from recovery simply because the jury finds that the bus only crowded the third car off of the road, and did not actually strike

it. Such a plaintiff cannot consistently and effectively plead both that the bus struck the third car, and also that the bus failed to strike the car, but did succeed in crowding it off of the road. Plaintiffs allege their strongest case. If their proof fails to substantiate all they allege but does prove actionable negligence which does not mislead the defendant, plaintiff should be entitled to recover.

CONCLUSION:

The foregoing authorities clearly show the following: 1. That all authorities agree and hold that evidence of failure to have a driver's license is immaterial unless there is some causal connection between the failure to have the license and the injuries complained of. Such a causal connection is not shown, but is actually affirmatively rebutted by all the evidence. In spite of this fact defendants introduced evidence of the failure to have such a license, and commented upon such failure in their argument to the jury. The error was rendered more grievous by the fact that the court failed and refused to give plaintiff's corrective instructions, and failed to give any instructions which would correct the erroneous impression created and emphasized in the minds of the jurors. 2. The court erroneously instructed the jury that failure to prove that the defendants' bus actually struck the Rose Sorenson car constituted failure to prove a case against the defendants. The jury was thus instructed that even though they may have found that the defendant bus crowded the Sorenson car off of the road

so that it became uncontrollable and caused the injuries complained of, still plaintiff could not recover. For these reasons we feel that plaintiff was denied a fair and impartial trial.

Respectfully submitted

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